MOTION FILED
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92-714

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FRANCIS GEORGE HINKLEMAN,

Petitioner,

V.

SHELL OIL COMPANY,

Respondent.

MOTION OF VIRGINIA GASOLINE MARKETERS & AUTOMOTIVE REPAIR ASSOCIATION, INC. FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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MOTION FOR LEAVE TO FILE AMICUS BRIEF AND STATEMENT OF INTEREST

Virginia Gasoline Marketers & Automotive Repair Association, Inc. ("VGMARA"), hereby moves this Court for leave to file an amicus curiae brief in support of the Petition for a Writ of Certiorari filed herein. Leave is sought due to the paramount national significance of the issues presented to the members of state associations such as VGMARA, as well as to the motoring public.

VGMARA is the trade association representing Virginia's service station dealers, owner/operators of convenience stores and gasoline retail outlets, and owners of automotive repair facilities. The preponderance of its members are

franchised dealers of the major oil companies, and operate pursuant to franchise agreements covered by the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. Section 2801, et seq.

VGMARA has been an active force at the state level in legislation concerning petroleum marketing and an active litigant in Federal Court on issues involving construction of the statute at issue. VGMARA believes that it is qualified to present to the Court the analysis and argument that would more fully develop the Court's understanding herein. VGMARA's concerns are necessarily broader than those of the parties, and only VGMARA can

adequately represent its members' interests.

The issues raised in this case are of grave concern to VGMARA. The proper interpretation of the PMPA is particularly important and VGMARA believes that the appellate court did not have before it the legislative history of the PMPA. This decision conflicts with previous decisions of the Fourth Circuit as well as other circuits and is contrary to the basic underlying tenant of the PMPA, franchisee protection from arbitrary and discriminatory franchise termination.

As of this writing Petitioner has given his consent to filing this motion. Respondent's consent has been sought and

as of this date, has not been given to VGMARA.

QUESTIONS PRESENTED

I. Does the federal Petroleum Marketing Practices Act permit inquiry into pretext and the reasonableness of a termination where, despite the franchisor's facial compliance with the termination provisions of the Act, the evidence suggests that the termination is ill motivated, arbitrary and discriminatory?

II. Is a leased service station a "service or facility" within the meaning of Section 2(e) of the Robinson Patman Act and Maryland's analog thereto?

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NO. _____

IN THE

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OCTOBER TERM, 1992

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v.

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Respondent

AMICUS BRIEF OF VIRGINIA GASOLINE MARKETERS & AUTOMOTIVE REPAIR ASSOCIATION, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ANALYSIS

Francis George Hinkleman ("Hinkleman") has petitioned this Court for a writ of certiorari to review the

judgment of the Court of Appeals for the Fourth Circuit which was entered on May 6, 1992, and the denial of petition for rehearing with suggestion for rehearing in banc, which was entered on July 28, 1992.

Amicus, Virginia Gasoline Marketers & Automotive Repair Association, Inc. ("VGMARA"), addresses herein only the first question presented in the petition filed herein, to-wit:

> "Does the federal Petroleum Marketing Practices Act permit inquiry into pretext and the reasonableness of a termination where, despite the franchisor's facial compliance with the termination provisions of the Act, the evidence suggests that the termination is ill motivated, arbitrary and discriminatory?"

STATEMENT OF THE CASE

Petitioner is a former franchisee of Respondent, Shell Oil Company ("Shell"),

who operated a Shell retail service station in Pasadena, Maryland. This case arose when Shell terminated Hinkleman's franchise because of his alleged "failure to pay in a timely manner when due all sums to which Shell was legally entitled."

A. **THE FOURTH CIRCUIT'S DECISION.**

The Fourth Circuit, in a per curium opinion, affirmed the district court's grant of summary judgment on the PMPA claim, adopting Shell's position that a termination for failure to timely pay is per se reasonable, and that "further inquiry into pretext is unnecessary".

Hinkleman thereafter petitioned for rehearing, with a suggestion for a rehearing en banc, which was denied. The Petition urges that a writ of

certiorari be granted to review the Fourth Circuit's action.

REASONS FOR GRANTING THE PETITION

I. THE PMPA CLAIM.

A. Introduction.

VGMARA strongly believes that review by this Court is vital in order to resolve a conflict among the Circuits on whether, and to what extent, Courts inquiry into the reasonableness of terminations under the PMPA "events" sections, 15 U.S.C. 2802(b)(2)(C) and 2802(c), should be permitted. The decision below widens the split of authority on that issue, but goes far beyond any other case that has prohibited such inquiry by precluding inquiry into pretext. By its holding, the Fourth Circuit has ignored the

PMPA's major underlying goal and purpose; namely to assure franchisee of an opportunity to challenge arbitrary and discriminatory franchise terminations. This decision has substantially eroded these protections afforded to such franchisees by PMPA. Review is necessary to restore the proper balance to the Act and to resolve the conflict on an issue that has occurred, and which will surely reoccur in the future.

The court below apparently did not consider the legislative history of PMPA, as other courts considering this issue have done, in arriving at its decision. A thorough analysis of PMPA and its legislative history, therefore, is critical to a proper analysis of this

issue.

B. The PMPA.

In 1978, Congress enacted Title I of the PMPA to protect franchisees from "arbitrary or discriminatory termination or nonrenewal of their franchises." Barnes v. Gulf Oil Corp., 795 F.2d 358, 360 (4th Cir. 1986). See also, S. Rep. No. 731, 95th Cong., 2d Sess. 15, reprinted in 1978 U.S. Code Cong. & Admin. News 873, 874 ("Senate Report"). In enacting PMPA, Congress was responding to evidence of a pattern of abuse by refiners. This is supported by the Act's legislative history:

> "It is apparent from the legislative history of the Act that Congress was responding to what it perceived as a pattern of abuse by major oil companies of their franchise relationships with

petroleum retailers." Note, Judicial Interpretation of the Petroleum Marketing Practices Act: Conflict and Diversity, 32 Emory L.J. 273 at 274.

PMPA was enacted following several years of study and hearings by Congress, and by Rep. John Dingell, the primary author of the Act. See generally, Comment, Retail Gasoline Franchise Terminations and Nonrenewals Under Title One of the Petroleum Marketing Practices Act, 1980 Duke L.J. 522, 529 n.40. Not surprisingly, the Act was bitterly opposed by the major oil companies who argued that such remedial legislation was not needed. Clearly, Congress felt differently:

> "The very act of passing the PMPA indicated Congress' rejection of the view advanced by the major gasoline distributors that remedial legislation was unnecessary because the interests of distributors and franchisees were in harmony."

Slatky v. Amoco Oil Company, 830 F.2d 476, 483.

By its enactment of PMPA, Congress sought to balance the competing interests of the parties and in so doing gave the oil companies some flexibility in its marketing decisions, including decisions to terminate franchises. However, it did not allow or envision such flexibility on the part of the oil companies to be used as a means of circumventing the overall purpose of the Act; that is, survival of the franchisee and protection from arbitrary and unreasonable franchise termination:

> "I believe that several important matters regarding this legislation should be appreciated. First, the grounds specified as justification for termination or non-renewal of a franchise are intentionally broad enough to provide franchisors the flexibility with which to meet changing consumer preferences. However, to assure that franchisees nevertheless receive the meaningful protections this legislation is intended to provide, and to assure that this flexibility does not frustrate the purposes of this legislation, the bill utilizes very specific enforcement mechanisms."

123 Cong. Rec. p. 10383, April 5, 1977 (Statement of Rep. John Dingell).

The Fourth Circuit acknowledged this fact in Barnes v. Gulf Oil Corp., 824 F.2d at 304, 305 [PMPA injunction standard intentionally drawn to benefit small retailers].

Rep. Dingell made it clear that franchisee protection was the overriding

concern of Congress in its enactment of PMPA:

> "I want the record to show clearly so that it can be seen that this is a balanced piece of legislation, balanced towards the franchisees as opposed to the franchisors."

Hearings on HR 130, before the Committee on Interstate and Foreign Commerce (Energy and Power Subcommittee), 95th Congress, 1st Session at pp. 158, 226, Serial No. 95-51.

Courts have consistently considered the underlying purpose of PMPA as well as its legislative history in ruling on franchise terminations. The Act was intended to remedy the disparity of bargaining power between franchisors and franchisees, and to preserve "the competitive influece of independent

franchisees in the marketplace." Roberts v. Amoco Oil Company, 740 F.2d 602, 602 (8th Cir. 1984). As remedial legislation, it must be construed liberally, consistent with its primary goal of protecting franchisees. Humboldt v. Exxon Co., U.S.A., 695 F.2d 386, 389 (9th Cir. 1982).

PMPA seeks to achieve its goals by "specifically set[ting] forth the permissible grounds for termination or nonrenewal of franchise relationships, and bestow[ing] on federal courts jurisdiction to remedy violations of the Act." Doebereiner v. Sohio Oil Co., 880 F.2d, 329,332 (11th Cir. 1989), amended on den. of pet. for reh., 893 F.2d 1274 (11th Cir. 1990) ["reasonable" under PMPA means objective reasonableness

under all of the facts and circumstances. Reasonable defined to mean "fair, just, moderate or proper"]. Under the PMPA, the termination of a petroleum franchise is barred unless the termination meets specific statutory justifications. Darling v. Mobil Oil Corp., 864 F. 2d 981, 984 (2d Cir. 1989). As described in Bridges Enters. v. Exxon Co. U.S.A., 820 F.2d 123, 124 (5th Cir. 1987), "[t]he statute is exclusive: a franchisor may terminate or nonrenew a franchise only if its action is based on a permitted ground, and only if the stringent notification requirements of Section 2804 have been met." See also, Barnes v. Gulf Oil Corp., 795 F.2d at 361. To further its beneficent purposes, PMPA shifts the

burden of proof to the franchisor to show that the termination was in compliance with the Act. 15 U.S.C. 2805(c).

One of the grounds that PMPA recognizes as a basis for terminating a franchise is the "occurrence of an event which is relevant to the franchise relationship and as a result of which, termination of the franchise or nonrenewal of the franchise relationship is reasonable. . ." 15 U.S.C. 2802(b)(2)(C). Included as such an "event" is the "failure by the franchisee to pay in a timely manner when due all sums to which the franchisor is legally entitled." 15 U.S.C. 2802(c)(8). Any "failure" which is only "technical or unimportant to the

franchise relationship", or "any failure for a cause beyond the reasonable control of the franchisee," 15 U.S.C. 2801(13), is, however, excluded.

C. The Present Case.

In the present case, Shell relied upon Hinkleman's alleged "failure to pay timely" as the asserted ground for the termination. Shell presented evidence that Hinkleman had tendered several checks to Shell that had been returned due to insufficient funds, and that there had formerly been an outstanding balance on Hinkleman's trade account. Hinkleman presented evidence showing that any " failure" was only "technical or unimportant" because the checks were promptly replaced; because Shell had

previously ignored the outstanding balance on the trade account, despite Hinkleman's efforts to secure its resolution; and, because Shell was ignoring substantial outstanding balances owed by others. Moreover, Hinkleman presented evidence to show that his payments were nevertheless "timely" under the PMPA standard, despite the technical delays, because of Shell's own established practices with respect to payment. Additionally, however, Hinkleman presented substantial evidence that Shell's reliance upon the "failure to pay" ground was a pretext, and that Shell had arbitrarily and discriminatively singled Hinkleman out for disparate treatment. Hinkleman argued that the facts in the

record were sufficient to raise an inference of pretext so as to preclude the summary determination of the issue. Shell's failure to act on more egregious violations by others; Shell's termination of Hinkleman on the basis of several NSF checks that ordinarily would not be sufficient to warrant termination action; Shell's expressed dissatisfaction with Hinkleman for reasons unrelated to any payment problems; Shell's "ad hoc" approach to terminations; and, Shell's actions in holding two substantial checks longer than normal and depositing them on the same day, all suggested an improper motive according to Hinkleman.

The district court rejected Hinkleman's arguments, finding such

evidence insufficient to withstand Shell's summary judgment motion. Drawing a positive inference from Shell's ad hoc approach to terminations, as opposed to the negative inference drawn in analogous contexts, see, e.g., Fowler v. Blue Bell, Inc., 737 F.2d 1007, 1011 (11th Cir. 1984) (selection processes which are conducted in an ad hoc or discretionary manner must be viewed with particular suspicion), the district court granted Shell summary judgment. On appeal, the Fourth Circuit adopted Shell's argument that the PMPA ground upon which Shell relied was per se reasonable under the statute, and that further inquiry into pretext was thus unnecessary.

In adopting its "per se" approach to the reasonableness of the termination where a 2802(b)(2)(C) and 2802(c) "event" is involved, the Fourth Circuit followed the approach of the First, Second and Eleventh Circuits. Those Courts had previously found that a "termination [for an "event"] is conclusively presumed to be reasonable as a matter of law," Desfosses v. Wallace Energy, Inc., 836 F.2d 22, 26 (1st Cir. 1987); that "a court need make no further inquiry as to the reasonableness of the termination," Russo v. Texaco, Inc., 808 F.2d 221, 225 (2d Cir. 1986); and, that the list of "events" under 2802(c) "provides twelve situations in which Congress has decided that termination of a franchise

agreement is reasonable," Clinkscales v. Chevron USA, Inc., 831 F.2d 1565, 1573 (11th Cir. 1987), without the need for further inquiry.

The above approach is directly contrary to that taken by the Third, Sixth and Seventh Circuits, which have recognized that a 2802(b)(2)(c) and 2802(c) event should not be construed as "a per se termination rule favoring franchisors," Sun Refining and Marketing Co. v. Rago, 741 F.2d 670, 673 (3d Cir. 1984); that the Court "must scrutinize the reasonableness of terminations even when an event enumerated in Section 2802(c) has occurred," Marathon Petroleum Co. v. Pendleton, 889 F.2d 1509, 1512 (6th Cir 1989); and, that "events in the nature of contract

violations must be assessed by an independent analysis of reasonableness and materiality," Brach v. Amoco Oil Co., 677 F.2d 1213, 1221 (7th Cir. 1982).

D. The Fourth Circuit's Extension of the Per Se Termination Rule.

The Fourth Circuit has, by its decision in this case, extended the "per se" rationale to a new extreme by precluding inquiry into pretext. By so holding, not only did the Court part company with the Circuits rejecting the "per se" approach, but it also deviated from every other Court which has considered the issue of pretext in the PMPA setting. This decision, if permitted to stand, will have the effect of allowing oil companies to continue a

pattern of abuse which the PMPA was enacted to prevent. An oil company is free to arbitrarily terminate a franchise in a discriminatory manner and so long as it facially complies with PMPA's requirements, it is free from scrutiny. This is troubling to VGMARA and to its members covered by PMPA.

In Brach v. Amoco Oil Company, supra, the Seventh Circuit recognized that even in the case of a nonrenewal based on a franchisor's business decision to nonrenew because of unprofitability under 15 U.S.C. 2802(b)(3)(D), "some analysis may be necessary to determine whether [the franchisor's decision] was nothing more

than a pretext for nonrenewal". 677 F.2d at 1222. In Valentine v. Mobil Oil Corp., 789 F.2d 1388, 1392 (9th Cir. 1986), the Ninth Circuit, considering a nonrenewal under 15 U.S.C. 2802(b)(3)(A) ("failure to agree" to changes in the franchise), stated that courts will not "second guess" business decisions of the franchisor "[s]o long as the franchisor does not have a discriminatory motive or use the altered terms as a pretext to avoid renewal . . . ." In Sandlin v. Texaco Refining and Marketing, Inc., 900 F.2d 1479 (10th Cir.), cert. denied, 111 S.Ct. 252 (1990), the Tenth Circuit quoted the above language from Valentine in recognizing that the franchisor may nonrenew for legitimate business reasons

recognized by the Act as long as there is no "discriminatory motive" or "pretext". Id. at 1482.

The district courts have likewise recognized that terminations must not be pretextual. In Gilderhus v. Amoco Oil Co., 470 F. Supp. 1302 (D. Minn. 1979), there was evidence presented that Amoco's termination was motivated by retaliatory considerations, and that it was simply looking for an excuse to terminate. In granting the dealer a preliminary injunction, the Court stated that such a termination would be invalid "since it would be contrary to the very purpose and policies of the [Act] to provide franchisees with meaningful protections from arbitrary and discriminatory terminations.'" 470 F.

Supp. at 1305. In a later hearing in the same case, the Court noted that "[a]llowing Amoco to effect what might in fact be proved to be a retaliatory termination while maintaining technical compliance with the Act would violate the spirit and intent of the Act." Gilderhus V. Amoco Oil Co., 1980-81 Trade Cas. (CCH), Para. 62,649 at 77,496 (D. Minn. 1980). See also, Brownstein v. Arco Petroleum Products Co., 604 F. Supp. 312, 315 (E.D.Pa. 1985) (Court emphasizes PMPA's concern over "pretextual nonrenewals"); Rogue Valley Stations, Inc. v. Birk Oil Co., 568 F. Supp. 337, 347-48 n. 6 (D.Or. 1983) (franchisor who uses expiration of underlying lease as a pretext for what is actually a retaliatory or

discriminatory termination might be found in violation of the PMPA); Exxon Corp. v. Miro, 555 F. Supp. 234, 237 (C.D. Cal. 1983) (same); Union Oil Co. of Calif. v. O'Riley, 276 Cal. Rptr. 483, 492 (Cal. App.2d Dist. 1990) (the termination was found to be in retaliation for O'Riley's complaints about various conditions. The Court found that "[t]his type of retaliatory termination is exactly the sort of conduct which Congress enacted the PMPA to prevent"). In all of these cases, the need for a second level analysis into pretext was recognized.

PMPA's legislative history, and in particular of the "event" section at issue here, undercuts the court's opinion. The Senate Report contains

extensive discussion of the event exception. With respect to the "failure to timely pay" exception it states:

> "Another enumerated event relates to the failure by the franchisee to pay to the franchisor all sums to which the franchisor is legally entitled. A standard of timely payment is utilized. This standard is intended to permit evaluation of nonpayment or late payment in view of prevailing commercial or industry trade practices."

1978 U. S. Code Cong. & Admin. News at 896. Application of the per se rule prevents this evaluation from taking place, and would allow an oil company to terminate disfavored dealers in an arbitrary and discriminatory manner. Almost all oil companies have an established trade practice for handling dealers and distributors with financial problems. Evidence that an oil company

treated a particular dealer in a manner inconsistent with its own established practices, or inconsistently with similarly situated dealers should be allowed to be evaluated by the trier of fact, to determine whether the termination is in fact objectively reasonable. Retaliatory and discriminatory treatment are evils which the PMPA was designed to address and any presumption of reasonableness that arises as the result of the occurrence of an enumerated event is rebuttable.

E. Inquiry into Pretext is Necessary Whenever the Statute Seeks to Prohibit Arbitrary and Discriminatory Conduct.

The need for inquiry into pretext is readily apparent where "arbitrary and discriminatory conduct" is the evil

sought to be remedied. In other statutes, the purpose of which is to prevent discriminatory conduct, inquiry into pretext is recognized as essential, despite the absence of language mandating such inquiry in the acts themselves. Common sense requires that such an inquiry be performed. For example, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq., a federal statute prohibiting discriminatory practices in employment, this Court, despite the absence of any mention of a pretext inquiry in the Act, has repeatedly held that such an inquiry is necessary. See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973) ("Title VII does not . . . permit petitioner to use respondent's

conduct as a pretext for [prohibited discrimination]"); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255-57 (1981) ("[P]laintiff must . . . have an opportunity to prove . . . that the legitimate reasons offered by the defendant were a pretext for discrimination."). Likewise, in discrimination suits under 42 U.S.C. 1981, inquiry into pretext is recognized as an essential question, although no mention is made of this inquiry in the legislation. Patterson v. McLean Credit Union, 491 U.S. 164, 187 ("The evidence which petitioner can present in an attempt to establish that respondent's stated reasons are pretextual may take a variety of forms.").

The implicit reasoning behind all of these mandated inquiries into pretext is the same -- such inquiry is necessary in order to effectively prevent the evil sought to be remedied. Here, allowing franchisor to rely upon a statutory ground for termination, but precluding inquiry into pretext, will undermine PMPA's protections and the statutory objectives which Congress sought to achieve. Only by allowing such inquiry can a statute aimed at preventing arbitrary and discriminatory conduct be given its intended effect.

While the Fourth Circuit has acknowledged the remedial nature of PMPA, (for example the Court held that PMPA's injunctive standard is a very liberal standard that was intentionally

crafted to benefit small dealers such as Hinkleman, Barnes v. Gulf, 824 F.2d 300, 304 (4th Cir. 1987), the Fourth Circuit's holding in the present case is apparently being read in a way that is contradictory to the Barnes premise. Hinkleman is also being read in a way that is apparently contrary to the holdings of other circuits. At best there is some confusion as to how to harmonize the authorities.

While Hinkleman is being read to establish a per se rule that technical compliance with PMPA precludes any inquiry into surrounding circumstances, such a reading would foreclose taking cognizance of equitable considerations which may otherwise be outcome determinative. That would be contrary to

Congressional intent. For example, at the hearings on PMPA, the principal sponsor, Chairman Dingell stated:

> "I want the record to show clearly so that it can be seen that this is a balanced piece of legislation, balanced toward the franchisees as opposed to the franchisors."

Hearings on HR 130, Before the Committee on Interstate and Foreign Commerce (Energy and Power Subcommittee), 95th Congress, 1st Session at 158, Serial No. 95-51. In fact other Circuits have made clear that for a termination or non-renewal to be "reasonable" under the specified grounds in PMPA means taking cognizance of surrounding circumstances. See Darling v. Mobil, 864 F 2d 981 (2d Cir. 1989) (term "reasonable" under the PMPA means objective reasonableness

under all the facts and circumstances); Doebereiner v. Sohio, 880 F 2d. 1213, as amended 893 F 2d 1275 (11th Cir 1989); Eden v Amoco, 741 F. Supp 1192 (D. Md. 1990) (term "reasonable" means objective reasonableness under all facts and circumstances). Of particular clarity on this point is the analysis of the Tenth Circuit in Filiaga v. Chevron, No 89-4098 (10th Cir July 20, 1990) Unpublished opinion, where the Court reasons:

> "The legislative history supports the view that equitable estoppel should be considered even in the face of compliance with the Act. . . ."

The legislative history goes on to state:

> "It is clear that no single statutory principle would be flexible enough to deal with so wide

> a range of potential conflicts. . . . [PMPA] leaves to the Courts the task of resorting to traditional principals of equity to maximize attainment of competing statutory objectives . . ."

[Senate Report No. 731, supra]

> "We are persuaded that compliance with the provisions of the PMPA was not intended by Congress to insulate the franchisor from equitable considerations and therefore hold that the district court must examine Filiaga's claim of equitable estoppel."

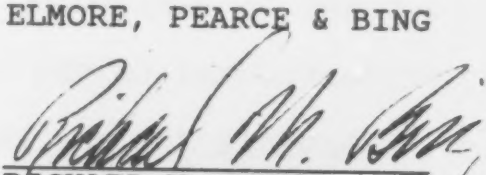
Filiaga, supra at 5, 6.

CONCLUSION

For the foregoing reasons Amicus VGMARA respectfully requests that a Writ of Certiorari be granted.

Respectfully submitted,

ELMORE, PEARCE & BING



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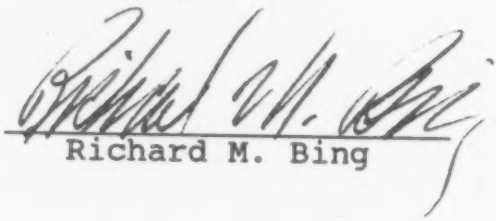
ASSOCIATION, INC.

Counsel of Record

CERTIFICATE

I hereby certify that a true copy of the foregoing Motion of Virginia Gasoline Marketers & Automotive Repair Association, Inc. for Leave to file Amicus Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit was mailed, first class and postage prepaid, to Harry G. Storm, Esq., Abrams, West & Storm, P.C., 4550 Montgomery Avenue, Suite 760N, Bethesda, Maryland 20814, Counsel of Record for Petitioner Francis G. Hinkleman, and to M. Albert Figinski, Esq., Weinberg & Green, 100 S. Charles Street, Baltimore,

Maryland 21201, Counsel of Record for Respondent Shell Oil Company, on this 23rd day of November, 1992.



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